Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Amendment of Part 90 of the	)	PR Docket No. 93-144
Commission's Rules to Facilitate	)	RM-8117, RM-8030
Future Development of SMR Systems	)	RM-8029
in the 800 MHz Frequency Band	)	
and		
		DOCKET FILE COPY ORIGINAL
Implementation of Section 309(j)	)	
of the Communications Act -	)	PP Docket No. 93-253
Competitive Bidding	)	
800 MHz SMR	)	

To: The Chief, Wireless Telecommunications Bureau

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

Robert S. Foosaner
Senior Vice President
Government Affairs

Lawrence R. Krevor
Director - Government Affairs

Laura L. Holloway
General Attorney

Nextel Communications, Inc.
800 Connecticut Avenue, N.W.
Suite 1001
Washington, D.C. 20006
202-296-8111

August 4, 1995

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030 RM-8029
and		
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PP Docket No. 93-253

To: The Chief, Wireless Telecommunications Bureau

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to Public Notice of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") hereby files these Comments on the proposed treatment of designated entities in the above-referenced proceeding.1/

On November 4, 1994, the Commission proposed restructuring the licensing of 800 MHz Specialized Mobile Radio ("SMR") frequencies, including the use of auctions to select from among mutually exclusive applications for wide-area authorizations.2/ The Commission now seeks comment on whether it can adopt special provisions for designated entities in the proposed 800 MHz SMR

1/ Public Notice, DA 95-1651, dated July 25, 1995.

2/ *See* Further Notice of Proposed Rule Making, PR Docket No. 93-144, FCC 94-271, released November 4, 1994 ("the FNPRM").

auctions under the U.S. Supreme Court's recent decision in *Adarand Contractors, Inc. v. Pena ("Adarand")*.3/

II. DISCUSSION

Nextel is the largest provider of SMR and wide-area SMR services in the country. In August of 1993, Congress reclassified Nextel and most other SMR providers from Private Mobile Radio Services ("PMRS") to Commercial Mobile Radio Services ("CMRS"), a category of telecommunications services to be regulated as common carriers along with, among others, cellular and Personal Communications Services ("PCS").4/ In creating this new category of mobile service providers, Congress mandated that the Commission establish within one year (August 10, 1994) new rules and regulations for CMRS providers that would eliminate the existing regulatory disparities among them.5/ Parity in licensing, operational and technical rules, Congress stated, is necessary to ensure that similarly situated, competitive providers are regulated in a similar manner.

Recognizing the significant changes that reclassification would have on SMR providers such as Nextel, Congress provided for a three-year transition period during which reclassified providers

---

3/ 63 U.S.L.W. 4523 (U.S. June 12, 1995).

4/ Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title IV, Section 6002 (b)(2)(B), 107 Stat. 312, 392 (1993).

5/ Within one year of the date of enactment of the Budget Act, the Commission was to have established new rules and regulations that would provide regulatory parity for all CMRS. Budget Act, Section 6002 (d)(3).

could prepare for the change to common carrier regulation. This, Congress envisioned, would permit reclassified providers a full two-year time period during which they could prepare for the imposition of new rules and regulations.6/

As of the date of this filing, August 4, 1995 (almost two years from the enactment of the Budget Act), the Commission has yet to establish a licensing scheme that provides regulatory parity for all CMRS. On the contrary, the Commission has perpetuated and compounded the disparities between existing and reclassified CMRS providers.

For example, while cellular carriers are free to continue building and modifying their systems, SMR operators have seen their ability to license, construct, and modify systems virtually halted as the Commission has frozen the licensing of SMR channels. Approximately 40,000 pending SMR applications -- many of which are for stations implementing new, digital wide-area SMR systems -- continue to sit in a backlog at the Commission's Licensing Bureau. Petitions for waiver of the licensing freeze for implementing applications, which the Commission explicitly authorized in the

---

6/ In the words of Congressman Edward Markey, Chairman of the House Subcommittee on Telecommunications and Finance, the three years provide a time period

> ". . . during which current providers of private land mobile service will continue to be treated in the same manner. The intent of this transition period is to provide those whose regulatory status is changed as a result of this legislation a reasonable time to conform with the new regulatory scheme."

139 Cong. Rec. H6163 (August 5, 1993).

Third Report and Order in GN Docket No. 93-252, continue to stagnate without Commission action, thereby jeopardizing the ability of SMR licensees to build and operate competitive wide-area systems.7/

In the two years since Congress enacted the Budget Act, the Commission has not only constrained SMR competitiveness with the licensing freeze, a forestalled rule making, and failure to grant implementing waiver applications, but has also proposed new obligations for reclassified SMRs as well. At the same time, it has moved expeditiously to ease the regulations imposed upon existing CMRS licensees. Rather than eliminating regulatorily-based disparities within the time frame provided by Congress, the Commission has:

(1) deregulated the cellular industry by rewriting Part 22 of the Rules;8/

(2) auctioned numerous PCS licenses;9/

(3) permitted cellular companies to begin offering dispatch services;10/

7/ *See* Third Report and Order, 9 FCC Rcd 7988 (1994) at para. 108. Many waiver applications have been pending for more than ten months.

8/ Report and Order, CC Docket No. 92-115, 9 FCC Rcd 6513 (1994).

9/ *See, e.g.,* News Release "FCC Grants Ten Regional Narrowband PCS Licenses," released January 23, 1995; News Release of March 13, 1995 announcing the conclusion of the Commission's first broadband PCS licenses.

10/ Report and Order, GN Docket No. 94-90, released March 7, 1995.

(4) permitted wireline telephone companies entry into the SMR industry;11/

(5) proposed increased regulatory burdens on SMRs, *e.g.*, equal access obligations,12/ resale obligations,13/ numerous other Title II obligations;

(6) reduced the permitted deconstruction time-period for SMRs from 12 months to three months;14/ and

(7) retained numerous unnecessary and antiquated obligations on wide-area SMRs, *e.g.*, station-by-station licensing, station-by-station fee payments, the inability to move, modify or construct within a footprint without prior Commission approval, continued operation on non-contiguous spectrum, and the continued requirement to provide co-channel interference protection to adjacent licensees.

The most significant disparity which the Commission has yet to remedy is the subject of this proceeding: a new licensing process for 800 MHz SMRs. Under the existing rules, SMR providers (which are expected to compete with cellular, PCS and other broadband CMRS providers) are licensed on a site-by-site basis, requiring

---

11/ *Id.*

12/ Notice of Proposed Rule Making, CC Docket No. 94-54, 9 FCC Rcd 5408 (1994).

13/ Second Notice of Proposed Rule Making, CC Docket No. 94-54, released April 20, 1995.

14/ Second Report and Order and Second Further Notice of Proposed Rule Making, PR Docket No. 89-553, FCC 95-159, released April 17, 1995. Nextel has filed for reconsideration of this Commission decision. This is a leading example of the Commission's failure to carry out its Congressional mandate to give all CMRS providers a substantially similar regulatory field on which to compete. The Commission reduced the permissible SMR deconstruction period to create parity with its cellular rules. Under the "deregulated" cellular rules, however, deconstruction is meaningless -- the cellular licensee still has exclusive use of the assigned spectrum. On the contrary, SMRs continue to be licensed on a site-by-site basis; deconstruction beyond 90 days results in cancellation of the station licenses.

thousands of individual licenses per system. Cellular and PCS providers, in contrast, need only one license per system, without regard to the number of sites they may implement therein. Cellular and PCS licensees, moreover, are provided contiguous blocks of exclusive-use spectrum, thereby eliminating any need to provide co-channel interference protection within their service area.15/

The Public Notice herein only perpetuates the delays in achieving licensing parity for the SMR industry. The delays at this point (at least a year behind mandate), are egregious in light of Congress' mandate that reclassified providers be given two years to transition to common carrier regulation. At this rate, reclassified SMRs will have little -- if any -- of the Congressionally-mandated transition period to conform their operations to the new CMRS regulations.

Therefore, the Commission should adopt a two-year transition period for all reclassified SMR providers, effective on the date that the final 800 MHz SMR auction rules are effective. Only then

---

15/ In the FNPRM, *supra* note 2, proposing to attain licensing parity for reclassified SMR providers, the Commission recognized these disparities, stating that:

> PCS and cellular rules provide significantly greater flexibility than our current SMR rules, in that they (1) authorize use of spectrum over Commission-defined service areas, (2) assign contiguous spectrum blocks to a single licensee on an exclusive basis, (3) use construction and coverage requirements rather than channel loading requirements to ensure efficient use of the spectrum, and (4) afford maximum flexibility to locate, design, construct and modify facilities within one's licensing area, so long as no interference is caused to other licensees.

FNPRM at para. 9.

can reclassified providers have the transition period as it was crafted by Congress, and only then can the Commission fulfill its statutory obligations.

III. THE ADARAND DECISION.

In the Budget Act, Congress required the Commission to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services. . . "16/ In *Adarand*, however, the U.S. Supreme Court held that any such "federal racial classification. . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest."17/ The imposition of this strict scrutiny standard does not mean that all opportunity-enhancing measures for minority and women-owned businesses are unjustified.18/ However, participants and prospective participants in the 800 MHz SMR industry have not been subjected to the "practice" or "the lingering effects of racial discrimination against minority groups" that gives rise to a compelling government interest in establishing race and gender-based preferences.

16/ Budget Act, Section 6002 (a). Congress also stated that the Commission "consider the use of tax certificates, bidding preferences, and other procedures. . ." *Id.*

17/ 63 U.S.L.W. 4523 (U.S. June 12, 1995), Mimeo at p. 34.

18/ On the contrary, as the Court stated in *Adarand*, "the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 35.

There is no evidence in the record of this proceeding or otherwise that minorities and/or women are underrepresented in the 800 MHz SMR business or that they have been the target of discrimination in obtaining SMR licenses. There is no evidence either in the record or otherwise that anything has prevented their entry into the market -- a market that requires little more than the filing of a $35 application fee and a minimal capital investment. These low barriers to entry are evidenced by the existence of some 33,000 licenses in the 800 MHz SMR industry, not to mention the pending backlog of nearly 40,000 SMR applications. The lack of evidence that women and minorities are underrepresented in the SMR industry does not meet the "compelling interest" standard of *Adarand*.

Even if the Commission were able to offer a compelling interest for designated entity race or gender-based classifications, the 800 MHz SMR auctions are particularly unsuited for crafting the required "narrowly-tailored classification" to fulfill that interest. Since the SMR Category spectrum is heavily licensed, each incumbent licensee will have to be either protected or moved by the auction winner. The winner of the SMR license, if an incumbent in that particular market, will continue its operations after the auction. In those cases, any benefit or privilege provided the designated entity -- whether it be bidding credits, installment payments or tax certificates -- will aggravate the inequities placed upon existing operators who will then be facing new common carrier regulation, PCS entry into the market and

-- as detailed in the previous section -- the delayed legislative promise of revised licensing to achieve regulatory symmetry.

As the above discussion suggests, the use of race or gender-based preferences in the 800 MHz SMR auctions are unlikely -- as a practical matter -- to offer legitimate operational opportunities to designated entities in many markets. Given the extensive SMR licensing in the 800 MHz SMR band, an auction winner that is not already an existing licensee is unlikely to obtain access to significant spectrum directly as a result of the auction.

Therefore, the Commission should investigate the representation of women and minorities in the entire CMRS industry and take appropriate action where it would be most effective. The 800 MHz SMR industry, by itself, does not have any history of past discrimination, continuing discrimination, or discrimination in access to capital for businesses owned by women or minorities to justify any race or gender-based classifications, given the lack of evidence of any discrimination and the unique circumstances under which the spectrum will be auctioned.

IV. CONCLUSION

The Commission has had two years to establish regulatory parity for all CMRS providers. Congress mandated that this parity be established a year ago, thereby permitting reclassified carriers two years to transition to the new regulatory framework. Without a new regulatory framework, reclassified providers are unable to utilize the transition explicitly provided them by Congress. Therefore, Nextel asserts that the Commission must provide a two-

year transition period -- during which reclassified providers will continue to be regulated as private carriers -- to be effective on the date the Commission's enacts regulatory parity for all CMRS.

Nextel also asserts that, given the lack of evidence of past or continuing discrimination, the Commission cannot, under the *Adarand* strict scrutiny standard, justify any race or gender-based classifications in the 800 MHz SMR auctions. Any special provisions, moreover, would not benefit women and minorities due to the existing extensive licensing in the SMR band.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.

by, 

Robert S. Foosaner
Senior Vice President
Government Affairs

Lawrence R. Krevor
Director - Government Affairs

Laura L. Holloway
General Attorney

Nextel Communications, Inc.
800 Connecticut Avenue, N.W.
Suite 1001
Washington, D.C. 20006
202-296-8111

Date: August 4, 1995

CERTIFICATE OF SERVICE

I, Ladonya D. Miller, hereby certify that on this 4th day of August, 1995, I caused a copy of the attached Comments of Nextel Communications, Inc. to be served by hand delivery to the following:

Chairman Reed E. Hundt
Federal Communications Commission
Room 814
1919 M Street, NW
Washington, D.C. 20554

Commissioner James H. Quello
Federal Communications Commission
Room 802
1919 M Street, NW
Washington, D.C. 20554

Commissioner Andrew C. Barrett
Federal Communications Commission
Room 826
1919 M Street, NW
Washington, D.C. 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
Room 844
1919 M Street, NW
Washington, D.C. 20554

Commissioner Susan Ness
Federal Communications Commission
Room 832
1919 M Street, NW
Washington, D.C. 20554

William Kennard
General Counsel
Federal Communications Commission
Room 614
1919 M Street, NW
Washington, D.C. 20554

David H. Solomon
Deputy General Counsel
Federal Communications Commission
Room 614
1919 M Street, NW
Washington, D.C. 20554

Peter Tenhula
Special Counsel
Federal Communications Commission
Room 614
1919 M Street, NW
Washington, D.C. 20554

Regina Keeney, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, NW
Washington, D.C. 20554

Rosalind K. Allen, Acting Chief
Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5202
2025 M Street, NW
Washington, D.C. 20554

David Furth, Deputy Division Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5202
2025 M Street, NW
Washington, D.C. 20554

Lawrence Atlas, Associate Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
1919 M Street, NW
Washington, D.C. 20554

Daniel Phythyon, Senior Legal Assistant
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002
2025 M Street, NW
Washington, D.C. 20554

Sally Novak, Chief Legal Branch
Commercial Radio Division
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5202
2025 M Street, NW
Washington, D.C. 20554

Blair Levin
Chief of Staff
Federal Communication Commission
Room 814
1919 M Street, NW
Washington, D.C. 20554

Rudolfo M. Baca
Senior Legal Advisor
Federal Communications Commission
Room 802
1919 M Street, NW
Washington, D.C. 20554

Lisa Smith
Legal Advisor
Federal Communications Commission
Room 826
1919 M Street, NW
Washington, D.C. 20554

Jill Luckett
Special Advisor
Federal Communications Commission
Room 844
1919 M Street, NW
Washington, D.C. 20554

David A. Siddall
Legal Advisor
Federal Communications Commission
Room 832
1919 M Street, NW
Washington, D.C. 20554

Ladonya D. Miller